

**STATE OF TENNESSEE**

OFFICE OF THE  
**ATTORNEY GENERAL**  
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April 21, 2004

Opinion No. 04-068

Constitutionality of House Bill 3592

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**QUESTION**

Does House Bill 3592 comply with the United States and Tennessee Constitutions?

**OPINION**

It is the opinion of this Office that House Bill 3592 is constitutional under the United States Constitution and defensible under the Tennessee Constitution.

**ANALYSIS**

House Bill 3592 would do several things. Section 2 of the act would remove the second trimester hospitalization requirement struck down in *Planned Parenthood v. Sundquist*, 38 S.W.2d 1 (Tenn. 2000). Section 3(a) requires that an abortion otherwise permitted by law must be performed only with the informed written consent of the pregnant woman. Section 3(b) requires that her attending physician or other appropriate health care professional must inform her of certain facts and have her sign a consent form acknowledging that she has been so informed. These facts are:

(1) That according to the best judgment of the attending physician or other health care professional she is pregnant;

(2) The number of weeks elapsed from the probable time of the conception of her unborn child, based upon the information provided by her as to the time of her last menstrual period or after a history, physical examination, and appropriate laboratory tests;

(3) That if more than twenty-four (24) weeks have elapsed from the time of conception, her child may be viable, that is, capable of surviving outside of the womb, and that if such child is prematurely born alive in the course of an abortion her attending physician has a legal obligation to take steps to preserve the life and health of the child;

(4) That numerous public and private agencies and services are available to assist her during

her pregnancy and after the birth of her child, if she chooses not to have the abortion, whether she wishes to keep her child or place the child for adoption and that she will be provided with a list of such agencies and the services available if she so requests; and

(5) Numerous benefits and risks are attendant either to continued pregnancy and childbirth or to abortion depending upon the circumstances in which the patient might find herself. These benefits and risks shall be explained to the best of such physician's or health care professional's ability and knowledge of the circumstances involved.

Section 3 (c) states:

At the same time the woman is given the information required by subsection (b), the physician or other health care professional shall also inform the pregnant woman of the particular risks associated with the pregnancy and childbirth and the abortion or child delivery technique to be employed, including providing her with at least a general description of the medical instructions to be followed subsequent to the abortion or childbirth in order to ensure her safe recovery.

Section 3(d)(1) provides "No abortion shall be performed until twenty-four (24) hours after the physician or other health care provider provides the required information." Section 3(d)(2) makes a violation of 3(d) a Class E felony.

Section 3(e) merely requires that the woman be provided with a duplicate copy of the signed consent form.

Section 3(f) provides that "The provisions of this section shall not apply in those situations where an abortion is certified by a licensed physician as necessary to preserve the life or health of the pregnant woman."

#### Application of the United States Constitution

In *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L. Ed.2d 674 (1992), the United States Supreme Court upheld a number of Pennsylvania statutory requirements regarding abortion because they did not constitute an undue burden on the right to an abortion. Regarding informed consent requirements, the Court said, "If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible." *Id.*, 112 S.Ct. at 2833. The Pennsylvania statute required the physician to provide the probable gestational age of the unborn child, a list of agencies offering alternatives to abortion, and the nature of the proposed procedure and the risks and alternatives including the risks associated with carrying the child to term. These provisions, which are very similar to Section 3(b)(2),(4) and (5) and 3(c) of House Bill 3592, were upheld. Confirming that she is pregnant, as required by Section 3(b)(1) and telling her that if the child is born alive in the course of the abortion the physician has a legal duty

to preserve its life and health, as required by Section 3(b)(3), are not untruthful or misleading either.<sup>1</sup> It is therefore the opinion of this office that these provisions are constitutional under the United States Constitution.<sup>2</sup>

Section 3(d) contains a 24 hour waiting period. It does not require two visits, unlike the two day waiting period struck down in *Planned Parenthood v. Sundquist*, supra at 19. Section 1 of House Bill 3592 states that the bill “provides for a short, twenty-four (24) hour period of reflection after the woman receives the information required for an informed consent.” In *Casey*, the United States Supreme Court said:

The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision...In theory, at least, the waiting period is a reasonable measure to implement the State’s interest in protecting the life of the unborn, a measure that does not amount to an undue burden.

*Casey*, 112 S.Ct. at 2825.

Finally, House Bill 3592 contains in Section 3(f) an emergency exception “where an abortion is certified by a licensed physician as necessary to preserve the life or health of the pregnant woman.” This is constitutionally required under *Casey*. *Id*, 112 S.Ct. at 2823.

It is therefore the opinion of this Office that House Bill 3592 passes constitutional muster under the United States Constitution.

#### Application of the Tennessee Constitution

In *Planned Parenthood v. Sundquist*, supra, the majority of the Tennessee Supreme Court rejected the undue burden standard used by the United States Supreme Court in *Casey* and instead applied the strict scrutiny standard. The Court struck down the second trimester hospitalization requirement, the physician-only counseling (consent) requirement, the waiting period and the emergency exceptions. It is important to note that the Court relied in part on *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983). The *Akron* case predates *Casey* and therefore uses the strict scrutiny standard of review rather than undue burden.

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<sup>1</sup>Tenn. Code Ann. § 39-15-206(a) obligates a physician to attempt to save the life of a child born alive during an abortion.

<sup>2</sup>*Casey* upheld a requirement that the physician provide the informed consent information. House Bill 3592, however, does not contain such a requirement. Section 3(b) clearly indicates that the information may be given by the attending physician or other appropriate health care professional.

The Tennessee Supreme Court rejected the requirement that only the attending physician could provide the information for the informed consent. “Because it is not necessary that the physician personally impart the required information to the woman in order for informed consent to occur, the physician-only counseling requirement is not narrowly tailored to further a compelling state interest and will not be upheld.” *Planned Parenthood* at 22. The Court followed the lead of the *Akron* case, where the United States Supreme Court said “The State’s interest is in ensuring that the woman’s consent is informed and unpressured; the critical factor is whether she obtains the necessary information and counseling from a qualified person, not the identity of the person from whom she obtains it.” *Akron*, 103 S.Ct. at 2502. Since House Bill 3592 permits the physician or other appropriate health care professional to provide the consent information, the bill would not seem to run afoul of the requirements of *Planned Parenthood*, supra.

The Court in *Planned Parenthood* struck down various consent requirements identical to those in House Bill 3592, Section 3 (b). They were not, however, rejected on their merits but rather because they were inextricably intertwined with the physician-only requirement. That is not the case under House Bill 3592. Although *Planned Parenthood* did not address the merits of these provisions, *Akron* did. Since the Court in *Planned Parenthood* relied on *Akron*, *Akron* should provide guidance as to how the Tennessee Supreme Court would approach these provisions. The ordinance at issue in *Akron* was practically identical to Section 3 (b)(1), (2), (3) and (4) and (c). *Akron*, 103 S.Ct. 2488. While the *Akron* Court also struck down all the informed consent provisions due to their linkage to a physician only counseling requirement, the Court observed that the provisions similar to Section 3 (b) (1)(fact of pregnancy), (2) (gestational age), and (4)( availability of assistance during pregnancy and after childbirth) were, to the extend accurate, “not objectionable....” *Akron*, 103 S.Ct. at 2501, footnote 37.<sup>3</sup> The Court also found the provision similar to Section 3 (c) permissible, except for the physician-only requirement. *Akron*, 103 S. Ct. 2501. Section 3(b)(3) contains truthful information<sup>4</sup> and should likewise be unobjectionable. The same can be said of Section 3(b)(5).

Section 3(d) establishes a 24 hour waiting period. According to Section 1, this is for “reflection after the woman receives the information required for informed consent.” In *Planned Parenthood*, the Court again relied on *Akron*:

In *Akron*, the United States Supreme Court struck down a twenty-four hour waiting period, reasoning that “careful consideration of the abortion decision by the woman ‘is beyond the state’s power to require.’” 462 U.S. at 450, 103 S.Ct. at 2503 (citation omitted). The Court characterized the twenty-four hour waiting period as “arbitrary and inflexible” and reasoned that the city had failed to show that the requirement increased the safety of abortion or

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<sup>3</sup>The Tennessee Supreme Court did observe in footnote 11, “We observe, however, that some of the provisions are narrowly tailored to further the State’s interest in maternal health, such as the requirement that the woman be told she is pregnant and the probable gestational age of the fetus.”

<sup>4</sup>See footnote 1, infra.

otherwise furthered a legitimate state interest. *Id.* The Court concluded:

The decision whether to proceed with an abortion is one as to which it is important to “affor[d] the physician adequate discretion in the exercise of his medical judgment.” In accordance with the ethical standards of the profession, a physician will advise the patient to defer the abortion when he thinks this will be beneficial to her. *But if a woman, after appropriate counseling, is prepared to give her written informed consent and proceed with the abortion, a State may not demand that she delay the effectuation of that decision.*

*Id.* at 450-51, 103 S.Ct. at 2503(emphasis added)(citation omitted)(footnote omitted).

*Planned Parenthood*, 38 S.W.3d at 23. The Tennessee Supreme Court was clearly bothered that the Tennessee waiting period was “the longest waiting period in the country,” and required two trips to the physician, thereby increasing the financial burden. *Id.*, at 24. The Court was of the view that the period was “not intended as an opportunity for reflection, but [was] actually intended as an obstacle to abortion.” *Id.*, at 24.

The waiting period established in Section 3(d) is shorter and expressly for reflection. It does not require two trips --- under the language of the provision the information does not have to be provided in person, so it can be provided by telephone or other means. As a result it does not increase the financial burden on the woman seeking the abortion. Therefore, this Office is of the opinion that the waiting period in Section 3(d), while not free from doubt, is defensible.

The medical emergency exceptions under consideration in *Planned Parenthood* addressed only situations in which the life of the mother is in danger. Therefore, the Court held that “the medical emergency exceptions fail to pass constitutional muster. They impermissibly impinge upon a woman’s fundamental procreational autonomy because they do not contain adequate provisions that will permit immediate abortions necessary to protect a woman’s health.” *Id.* at 24. The medical exception in House Bill 3592 includes the life or health of the pregnant woman and is therefore constitutional.

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